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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/646,041	08/22/2003	James E. Speed	ATA316	8517
30245	7590	10/02/2006	EXAMINER LEVY, NEIL S	
ANTHONY EDW. J CAMPBELL PO BOX 160370 AUSTIN, TX 78716			ART UNIT 1615	PAPER NUMBER

DATE MAILED: 10/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/646,041	<b>Applicant(s)</b> SPEED ET AL.	
	<b>Examiner</b> NEIL LEVY	<b>Art Unit</b> 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1=20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 8/22/03 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

### **DETAILED ACTION**

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 9 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 9 recites the limitation "cat litter" , there is none in claim 1, nor of limestone & clay in the specification. There is insufficient antecedent basis for this limitation in the claim.

Claims 14-20 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for the stake & method of making, does not reasonably provide enablement for inhibiting any burrowing mammal. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to practice the invention commensurate in scope with these claims. There is no basis given & no objective data or evidence that the stake is "poisoned" & at all effective to "inhibit", otherwise undefined in the claims or specification, a burrowing animal. There is no basis for means to carry out crumbling of a hard concrete object as of claim 16

Claims 1-17 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to

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which it pertains, or with which it is most nearly connected, to make and/or use the invention.

.There is insufficient support for preventing infestation-one could not know that the treatment would prevent all beetles or fungus from infesting all trees. Preventing is seen as an all or nothing phenomenon, and applicant must prove the negative. The presence of one colony anywhere, or one beetle, precludes preventing.

The factors to be considered in determining whether a disclosure meets the enablement requirement of 38 U. S. C. 112, the first paragraph have been described in re Wands, 8 USPQ2D 1400 (Fed Cir. 1988). Among these factors are (1) the nature of the invention; (2) the state of the prior art; (3) the relative skill of those in the art; (4) the predictability or unpredictability of the art; (5) the breadth of the claims. (6) the amount of direction or guidance presented; (7) the presence or absence of working examples; and (8) the quantity of experimentation necessary. When the above factors are weighed, it is the examiner's position that instant disclosure fails to meet the enablement requirement for the following reasons:

- (1) The nature of the invention: claims are to unqualified control and inhibition by a stake,
- (2) The state of the prior art shows the use of these stakes for specific protection-
- (3) The relative skill of those in the art. The relative skill of those in the art is high.
- (4) The predictability or unpredictability of the art. The unpredictability of the art is very high.
- (5) The breadth of the claims. The claims are very broad, as "inhibition" can not be proven to have been performed
- (6) The amount of direction or guidance presented. There are none; nor specific effects-the results expected are presumptive, no guidance given for determination if in fact the condition, burrowing by a mammal was actually caused by inventor to not present itself.

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(7) The presence or absence or working examples There are none.

(8) The quantity of experimentation necessary extensive-there is no known levels of amount useful of any specific agent against any specific organism shown to exhibit absence of the pest organism.

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1- 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dady 1296771 & Weiser et al DES 324558 or Carvalho et al '88 in view of Kendall et al us 2003/0024169 and Clendinning et al 3852913.

Dady & Weiser show the instant stakes for mole control invention, but not specifically of plaster of Paris, or a recitation of the simple steps one must go through in order to prepare any composition of matter, or an article: procuring the supplies, including chemicals, mixing bowls, etc., stirring, mixing, pouring, drying, molding, covering, packing, packaging, & so on, none seen as of patentable weight, in order to form into particles of a bait or repellant formulation a shaped forms-spike or steak, also shown by Carvalho, though for other purposes. The particular materials to make the stakes are not

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seen as unobvious, nor does the instant specification indicate any particular unexpected or unobvious results attendant to use of these materials, as opposed to others, of Dady.

However, KENDALL shows formation of articles made from the instant materials, [0040]-plaster of paris-gypsum, clay & limestone with castor oil plasticizer [0052] and sulfur compounds (mertcapto). Particles are, < 30 microns, thus within the instant ground size range [0054] & are combined with water. Shapes are as desired [0032, 0062]. Manufacture includes use of a mold or die, and curing [0076]. The instant claims are in open language- the other ingredients of Kendall are readily admitted. CLENDINNING is cited to show the polymeric packages within which one can put an article, of the instant or Kendalls.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made, desiring to utilize mammal control articles & compositions, to use one of those well known in the art, as exemplified by the primary references, with selection

of the equivalent materials any of the known materials at concentration effective to make stakes. Kendall provides the motivation to use mineral materials- they are abrasive, & as such would inhibit any animal within which they came in contact.

All the elements of the instant invention are disclosed. The amounts and proportions of each ingredient are result effective parameters chosen to obtain the desired effects. It would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular pest species of interest, reduction of toxicity, cost minimization, enhanced, and prolonged effects.

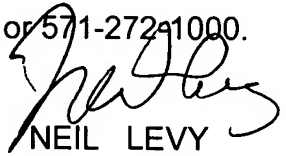
Applicant has not provided any objective evidence of criticality, non-obvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation as claimed, and the use of ingredient for the functionality for which they are known to be used is not a basis for patentability.

The instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by well known methods to achieve control over burrowers as is well known in the art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619. The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
NEIL LEVY  
Primary Examiner  
Art Unit 1615

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